Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

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December 3, 2021

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Water Resources and Environment
FROM: Subcommittee on Water Resources and Environment Staff
RE: Subcommittee Hearing on "Promoting Economic and Community Redevelopment and Environmental Justice in the Revitalization and Reuse of Contaminated Properties"

PURPOSE OF HEARING

The Subcommittee on Water Resources and Environment will meet in open session on Wednesday, December 8, 2021, at 10:00 a.m. ET in the Rayburn House Office Building, Room 2167, and by video conferencing via Zoom, to receive testimony on federal, state, and local efforts to address the nation's brownfields and other contaminated properties. The subcommittee will hear from local government officials and representatives of non-profit organizations, academia, and other stakeholders involved in the remediation and reuse of contaminated properties.

BACKGROUND

SUPERFUND

The *Comprehensive Environmental Response, Compensation, and Liability Act* (*CERCLA*), more commonly known as the Superfund law, establishes a framework to remediate certain types of contaminated sites and to hold the parties connected to those sites responsible for cleanup costs.[1] *CERCLA* authorizes the Environmental Protection Agency (EPA) to clean up contaminated sites, subject to annual appropriations, and to compel entities that bear responsibility for all or part of the contamination at a site to perform or pay for cleanup activities. Additionally, parties that incur cleanup costs may seek to recoup those costs from other responsible parties or from the Superfund Trust Fund, which was enacted to provide a source of funds for the federal government to finance the cleanup of contaminated sites where the responsible parties cannot pay or cannot be identified.[2]

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[1] See generally, Congressional Research Service, *Liability Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, March 12, 2021 (IF11790).

[2] See generally, Congressional Research Service, *Comprehensive Environmental Response, Compensation, and Liability Act: A Summary of Superfund Cleanup Authorities and Related Provisions of the Act*, June 14, 2012 (R41039). As originally enacted in 1980, section 211(a) of *CERCLA* authorized Superfund excise taxes on petroleum and chemical feedstocks, which were deposited into the Superfund

CERCLA cleanup and response actions fall into two categories. Removal actions are generally shorter-term actions taken to address immediate risks. Remedial actions are generally longer-term actions to address contamination more permanently, and may involve long-term treatment or containment of wastes in place. Although EPA cleans up some sites itself, it may also compel "potentially responsible parties" (PRPs)[3] to perform or pay for the cleanup. PRPs are liable if there has been: (1) an actual or threatened release (2) of a hazardous substance (defined in section 101(14) of *CERCLA*) that (3) causes the incurrence of response costs.[4] Liability is retroactive (parties may be liable for the release of hazardous substances prior to *CERCLA*'s enactment in 1980), strict (regardless of a party's negligence), and joint and several (a party may be liable for all cleanup costs at a site, even if other parties also contributed to the contamination).[5]

BROWNFIELDS

Brownfields are real properties, "the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[6] Types of brownfields include inactive factories, gas stations, salvage yards, or abandoned warehouses. These sites drive down property values, provide little or no tax revenue, and contribute to community blight. The EPA reports that an estimated 450,000 to one million brownfields sites exist within the United States.[7] Cleanup and redevelopment of these abandoned sites can increase local tax bases, promote economic development, revitalize neighborhoods, facilitate job growth, enable the creation of public parks and open space, or preserve existing properties, including undeveloped green spaces.

Brownfields Revitalization and Environmental Restoration Act

In 2001, Congress passed the *Brownfields Revitalization and Environmental Restoration Act of 2001*, contained as title II of the *Small Business Liability Relief and Brownfields Revitalization Act of 2001*, to create specific authority to conduct brownfields assessments and cleanups.[8] This legislation amended the Superfund law to authorize funding through EPA for brownfields assessment and cleanup grants, provide targeted *CERCLA* liability protections, and increase support for State and tribal voluntary response programs. In 2018, Congress further amended the program through the *Brownfields Utilization, Investment, and Local Development (BUILD) Act*, enacted as Division N of the *Consolidated Appropriations Act, 2018*.[9]

Trust Fund. Section 515(a) of the *Superfund Amendments and Reauthorization Act of 1986* expanded the reach of the tax on domestically manufactured chemical feedstocks to include imported chemical derivatives. Section 516(a) such Act established the special tax on corporate income to provide an additional revenue stream for the Superfund Trust Fund. The taxing authority for all three sources of revenue to the Superfund Trust Fund expired at the end of 1995, and general revenues appropriated annually have largely continued to fund the Superfund program. Section 80201 of H.R. 3684, the *Infrastructure Investment and Jobs Act*, reinstates the Superfund tax on certain chemical feedstocks through December 31, 2031. Section 136701 of H.R. 5376, the *Build Back Better Act*, would reinstate the Superfund tax on domestic and imported oil and petroleum throught December 31, 2031.

[3] Section 107(a) of *CERCLA* defines those parties liable for response costs for contaminated facilities as: (1) the owner or operator of the facility; (2) the owner or operator of the facility at the time of disposal of the hazardous substances; (3) any person who arranged for the disposal of a hazardous substance at the facility and (4) any person who accepts a hazardous substance for transport to the facility. See 42 U.S.C. 9607(a).

[4] See 42 U.S.C. 9607.

[5] See https://www.epa.gov/enforcement/superfund-liability.

[6] See 42 U.S.C. 9601(39) (definition of "Brownfield site"). See also, generally, *Overview of EPA's Brownfields Program*, located at https://www.epa.gov/brownfields/overview-epas-brownfields-program.

[7] See *Overview of EPA's Brownfields Program*, located at https://www.epa.gov/brownfields/overview-epas-brownfields-program

[8] See P.L. 107-118 (signed in January 2002).

[9] See P.L. 115-141, *Consolidated Appropriations Act, 2018*.

The brownfields program provides direct funding authority for brownfields site assessments, cleanups, revolving loans, environmental job training, technical assistance, and other funding assistance for state and tribal brownfields program. To facilitate the leveraging of public resources, EPA's brownfields program collaborates with other federal programs and state agencies to identify and make available resources for brownfields-related activities.

Specifically, the brownfields program authorizes $200 million annually (through fiscal year 2023)[10] for the following types of funding assistance:

- Brownfields Assessment Grants: which provide funding for brownfield inventories, planning, environmental assessments, and community outreach. Assessment grants are limited to $200,000 per site except in some cases, where due to size and contamination level, the limit is $350,000.[11]
- Brownfields Cleanup Grants: which provide funding to carry out cleanup activities at brownfields sites owned by the applicant. Cleanup grants are limited to $1 million per eligible entity (or a maximum of $650,000 per site) and can be awarded on a community-wide or site-by-site basis.[12]
- Brownfields Revolving Loan Fund (RLF) Grants: which allow eligible entities (as defined in section 104(k)(1)) to capitalize revolving funds for the remediation of brownfields, subject to the same funding limitations as direct grants.[13]

In addition, the brownfields program authorizes $50 million annually (through fiscal year 2023) for state and tribal response programs.[14] States and tribes may use this assistance to establish or enhance individual state response programs, capitalize existing revolving loan programs, and develop risk-sharing pools, indemnity pools, or insurance mechanisms to provide financing for remediation activities.[15]

The brownfields program also provides targeted protection from Superfund liability for innocent landowners, owners of property contaminated by a source on contiguous property, and for prospective purchasers of property which may be contaminated.[16] It clarified Superfund's "innocent landowner" defense against liability for a person who unknowingly purchased contaminated land, provided the person made "all appropriate inquiries" prior to the transaction.[17] The brownfields law did not define what constitutes "all appropriate inquiries," but directed EPA to establish by regulation the standards and practices which would satisfy the "all appropriate inquiries" requirement. On November 1, 2005, EPA issued a final rule establishing the standards and practices which would satisfy the "all appropriate inquiries" requirement.[18]

The brownfields program generally has been well received by EPA, states, communities, investors, and developers. According to EPA, since its inception, the brownfields program has assessed over 34,000

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[10] See 42 U.S.C. 9604(k)(13).
[11] See 42 U.S.C. 9604(k)(2) and (5)(A)(i).
[12] See 42 U.S.C. 9604(k)(3) and (5)(A)(ii).
[13] See 42 U.S.C. 9604(k)(3)(A)(i).
[14] See 42 U.S.C. 9628.
[15] See https://www.epa.gov/brownfields/state-and-tribal-response-program-grants.
[16] See 42 U.S.C. 9607(q) and (r).
[17] See 42 U.S.C. 9607(q).
[18] See 70 Fed. Reg. 66070. See also https://www.epa.gov/sites/production/files/2015-05/documents/aai_reporting_factsheet.pdf.

properties, has cleaned up over 2,200 sites and has made ready over 9,100 sites for reuse.[19] In addition, according to EPA, federal brownfields assistance has leveraged more than $35.2 billion in additional cleanup and redevelopment funding.[20] This is consistent with the intent of the brownfields program to provide vital federal "seed money" for redevelopment and to leverage this money in conjunction with funding from state, local, private, and other federal sources to address brownfield sites.[21] According to EPA, its brownfields program has helped to create or leverage almost 180,000 jobs.[22]

On May 11, 2021, EPA announced that 151 applicants (out of a total of 418 individual grant requests) were selected to receive 154 multipurpose, assessment, and cleanup (MAC) grants totaling $66.5 million.[23] Of this amount, $8.8 million in grants went for 111 multipurpose grants to conduct a range of eligible assessment and cleanup activities at one or more brownfields properties, $42.2 million in grants went for 107 site assessments, and $15.5 million went for 36 cleanup grants.[24]

On June 16, 2021, EPA selected 27 existing RLF grantees to receive $11.6 million in supplemental funding to help communities continue their work to carry out cleanup and redevelopment projects on contaminated brownfield properties.[25] Supplemental funding for RLF grants is available to grantees that have depleted their funds and have viable cleanup projects ready for work.

Funding of EPA's Brownfields Program

EPA's brownfields program has an authorized funding level of $250 million annually (through fiscal year (FY) 2023).[26] In FY 2021, Congress appropriated $161.78 million for the brownfields program, of which $91.0 million was for brownfields site assessment and cleanup grants, $46.2 million was for state voluntary cleanup programs, and $24.0 million was for EPA's administrative expenses for the program.[27] In the FY 2022 budget request, the administration has requested a total of $200.3 million for the brownfields program, of which $130.0 million is for brownfields site assessment and cleanup grants, $46.2 million is for state voluntary cleanup programs, and $24.2 million is for EPA's administration of the brownfields program.[28]

Brownfields Implementation Issues

Generally speaking, the brownfields program has been effective at expanding the redevelopment of former brownfields sites. In 2018, Congress amended the brownfields law in the *BUILD Act* to address stakeholder recommendations to further brownfields redevelopment and reuse, including: (1) expanded grant eligibility for non-profit redevelopment organizations; (2) increased per-project limits for remediation grants; (3) expanded grant authority for multi-purpose assessment and cleanup grants; and (4) new brownfields ranking criteria focusing on renewable energy and energy efficiency projects and waterfront

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[19] See https://www.epa.gov/brownfields/brownfields-program-accomplishments-and-benefits.
[20] See id.
[21] See https://www.epa.gov/brownfields/overview-epas-brownfields-program.
[22] See https://www.epa.gov/brownfields/brownfields-program-accomplishments-and-benefits.
[23] See https://www.epa.gov/brownfields/applicants-selected-fy-2021-brownfields-multipurpose-assessment-and-cleanup-grants.
[24] See id.
[25] See https://www.epa.gov/brownfields/announcing-fy21-supplemental-funding-brownfields-revolving-loan-fund-grants.
[26] See 42 U.S.C. 9604(k)(13) and 9628
[27] See https://www.epa.gov/planandbudget/fy-2022-justification-appropriation-estimates-committee-appropriations.
[28] See id.

developments.[29] The *BUILD Act* extended then-current authorization levels without increase for brownfields grants through FY 2023.

Brownfields stakeholders have advocated for increasing the overall authorization of appropriations for the brownfields program beyond the $250 million annual level.[30] Currently EPA receives four times more grant applications than can be funded under current appropriations.[31] Assuming full funding of the brownfields program, there would still likely be a shortfall between the amount requested through grant applications and annual appropriations.[32] Accordingly, stakeholders advocate for increasing the overall authorization of appropriations for the brownfields site assessment and cleanup grant component of the program commensurate with the apparent needs.

Another issue related to the program is establishing effective performance measures to determine the extent to which the program is achieving its goals. While EPA does report on the cumulative sites addressed, jobs generated, and the cleanup and redevelopment funds leveraged, there has been little reporting on cleanup and redevelopment activities, which is one of the primary objectives of the program. In partial response to these concerns, in 2020, EPA released a report that examined certain environmental benefits that accrue when brownfield sites are used for redevelopment.[33] This study, entitled *2020 Environmental Benefits of Brownfields Redevelopment—A Nationwide Assessment*, found that, when housing and job growth is accommodated by redeveloping existing brownfields sites, the expansion of paved impervious surfaces and average vehicle miles traveled per capita/per job are reduced as compared to accommodating the same amount of growth on previously undeveloped sites.[34]

On a related matter, as the program continues to mature, it is possible to begin reviewing the performance of the brownfields program in addressing redevelopment and reuse goals throughout the nation. Brownfields properties can be found in large urban centers, small and rural communities, and suburban neighborhoods. Since there are more applications for assistance under the brownfields program than can be funded under current appropriations, current funding of the brownfields program has limited the ability of the brownfields law to address all the site assessment and cleanup grant applications proposed in any one year. Yet, there has never been a formal review of the types of brownfields properties that have been addressed through the EPA program and how the current selection process, when combined with a lack of sufficient federal funding, addresses the types, geographic locations, and the independent economic capabilities of communities to revitalize brownfields properties that are present around the nation.

In its 1996 report that informed the creation of the initial EPA brownfields grant program, the National Environmental Justice Advisory Council (NEJAC) highlighted the importance of ensuring that brownfields investment "provide focus to a problem which by its very nature is inextricably linked to

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[29] https://www.epa.gov/sites/default/files/2018-08/documents/1-pg_build_summary_handout_508_0818.pdf.
[30] See witness testimony during Subcommittee hearing on *Building a 21st Century Infrastructure for America: Revitalizing American Communities through the Brownfields Program*, March 28, 2017, (https://www.govinfo.gov/content/pkg/CHRG-115hhrg24789/pdf/CHRG-115hhrg24789.pdf).
[31] Cf. List of applicants for brownfields grants in FY2021 (https://www.epa.gov/sites/default/files/2021-05/documents/fy21_mac_all_applicants_list_updated.pdf) and list of brownfields grant recpients for FY2021 (https://www.epa.gov/sites/default/files/2021-04/documents/fy21_bf_mac_grant_selections_may_2021.pdf).
[32] See id.
[33] https://www.epa.gov/brownfields/brownfields-program-environmental-and-economic-benefits.
[34] See id.

environmental justice"—which the NEJAC observed is both an urban and rural concern.[35] This concern about targeting brownfields site assessment and remediation grants was also recently highlighted by EPA Administrator Michael Regan in awarding the FY 2021 brownfields MAC grants. In an interview associated with this announcement, Administrator Regan noted, "[t]his is a significant opportunity for environmental justice communities and rural communities that for far too long have been living with blighted pieces of property."[36]

WITNESSES

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[35] https://www.epa.gov/sites/production/files/2015-02/documents/public-dialogue-brownfields-1296.pdf.
[36] https://apnews.com/article/business-environment-and-nature-government-and-politics-5a60b4e839dae5ab3268948a7bcb76fd.